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THE

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THE RIGHT OF EMINENT DOMAIN.

THAT a subject of such vital interest as the right to take private property for public uses, more particularly in the later history of the law, when the exercise of that right, in the furtherance of commercial enterprise has become of so frequent occurrence, should have received so small a share of the attention of the members of the profession, may well be a matter of some surprise.

While other departments of the law have received laborious comment, and ample illustration, and have been reduced into a regular and orderly system, facilitating the researches of the student, or the demands of the practitioner, this has remained scattered over the whole field of the English and American reports, and is to be reached only through a long and tedious examination of the several cases. Important as the subject undoubtedly is, no text book has as yet appeared upon it, and we begin our investigation without the advantage the labors of others always confer. We must remind our readers also, that within our prescribed limits, we have not the space to do our subject the justice its merits demand. If we are successful in discovering the leading, elementary principles, properly belonging to it, and establishing them upon reasonable foundations, we conceive all has been done our limits will permit.

The *History* of the subject of our essay, closely interwoven as it is with almost every political change among governments, would, of itself, be sufficient to cover far more than the limits assigned us. Tyrants have made it the plea of inflicting the most arbitrary measures in all ages of the world:¹ from the flagrant iniquity of Jezebel,² to the days of our own revolution, when England sent her minions among us, "To harass our people and eat out their substance," the earnest desire of mankind has been to secure themselves from an abuse of this power. The arbitrary exercise of it by Great Britain, in derogation of the rights of the citizens of this country, whereby private property was frequently taken, without consent and without compensation, drew from the patriots of the revolution our declaration of rights. It is a historical fact, that free institutions have generally originated in some arbitrary invasion of private right on the part of the government which preceded their establishment. Magna Charta was extorted from a tyrant, and the independence of America was the result of imperial oppression, exercised in hostility to private rights.³ The happy limitations which have been imposed on this power, both in England and at home, it will now be our business to consider.

When mankind, convinced that the only means by which their lives and property could be effectually secured to each other, was by some accumulation of power that should be able to resist successfully the aggressions of individual force,⁴ chose to form themselves into societies, and communities,⁵ for the purpose of creating that power, it was found that to accomplish the purpose of protection, certain rights and properties which had before subsisted in the individual man in his natural state, must be transferred to and become a part of the newly created power.⁶ The subject, then, by entering into the compact of society, consents to yield to that society, so much of his own liberty and right of property, as may be necessary to consummate the purposes for which he became a party

¹ 13 Bar. 36; 17 Wend. 302.

² 1 Kings, ch. 21.

³ 2 Denio, 487.

⁴ 1 Blac. Com. 43; Vattel, B. 1, ch. 4, § 39.

⁵ Burlamq. B. 2, ch. 3, § 20.

⁶ 1 Blac. Com., 125.

to the compact.¹ The power created by this contribution of rights, is termed the "sovereignty," and has for its object the protection and preservation to the subject, of these rights not so delegated to itself. It is the union and exercise of all human power possessed in a state.²

One of the component parts of this supreme power, is found to consist in rights granted touching the goods of the subject. He concedes the right to be directed in the manner of their use, so that his enjoyment of them may not be detrimental to his fellows;³ and also when the exigencies of the State, for its welfare or preservation, may require it, to yield up the remainder of his interest in a part or the whole of his property. This constitutes that part of the supreme power, which Puffendorf terms: "The power of the sovereign over the estates of his subjects;" and is by him divided into the right to make "sumptuary laws," and the right of "transcendental propriety."⁴

With the first of these elements we have nothing to do, we are directed to a consideration of that part of this power, which properly comprehends the latter. Vattel has most accurately and comprehensively defined it to be "THE RIGHT, WHICH BELONGS TO THE SOCIETY OR THE SOVEREIGN, OF DISPOSING IN CASE OF NECESSITY, AND FOR THE PUBLIC SAFETY, OF ALL THE WEALTH CONTAINED IN THE STATE."⁵

From this definition, it will be seen that the purpose and scope of the right of eminent domain, contemplate a benefit to the whole community, and thus the foundation of the principle, that it cannot be enjoyed or exercised by the individual.⁶ It is signified under the various terms, "Transcendental Propriety,"⁷ "Right Paramount,"⁸ and "Sovereign Domain."⁹ In the civil law it is known as "Dominium Eminens." In the modern English law, however, it is now universally known under the term Eminent Domain. It is to be

¹ Vattel, B. 1, ch. 4, § 38.

² Story Const., § 207.

³ Puff. B. 8, ch. 5, § 3.

⁴ Puff. B. 8, ch. 5, § 7.

⁵ Vattel, B. 1, ch. 20, § 244; Puff. B. 8, ch. 5, § 7; 2 Henec. § 166; Burlamq., vol. 2, pt. 3, ch. 5, § 24; Grot. B. 1, ch. 1, § 6; 2 Kent, 339; 1 Black. Com. 139; 2 Rutherf. Inst., 456.

⁶ 2 Dall. 310.

⁷ Puff. B. 8, ch. 5, § 7.

⁸ 2 Rutherf. Inst. ch. 9, § 6.

⁹ 10 Price, 460.

distinguished from the Public Domain, or domain of the State ; for the State as well as individuals may have a right of private property in certain things, and in regard to them exercises all the rights of an ordinary proprietor.¹

We propose to treat our subject in the following order :

Eminent Domain is a Right.

Whether a power or an interest.

As affected by the United States Constitution.

Which belongs to the Society or the Sovereign.

Where the right rests : Here.

In England.

Of Disposing.

By agents ; grants of authority.

Construction.

Compensation ; where required.

How ascertained, &c.

Where none required

In case of Necessity and for the Public safety.

Necessities ; Ordinary.

Extraordinary.

Of all the wealth contained in the State.

Property generally.

First, then it is a RIGHT.

The signification of the word, by which this part of our definition of eminent domain is described, will assist us materially in coming to an accurate understanding of the attribute itself. "By a right," says Rutherford,² we commonly mean that quality in a person, which makes it just or right for him either to possess certain things, or to do certain actions. This being the legal import of the word right, we conclude that it bears in its signification either the idea of a power, or only an interest. The books use rather indefinite terms, sometimes speaking of it indifferently as one or the other, and perhaps for practical purposes it is immaterial in which light it is viewed, but from a consideration of the nature of the right

¹ 19 Amer. Jur. 121-2 ; Proudhon. Traite du Domain, &c.

² Rutherford. Inst. B. 1, ch. 1, § 3.

itself, and the purpose of its exercise, we have come to the conclusion, that it partakes more of the nature of an interest in the property itself, than of a mere power to control its destination.¹ Again we prefer the words of the accurate and sententious Rutherford. "A nation by settling upon one tract of land, which, at the time of such settlement had no other owner, acquires in respect of all other nations, an exclusive right of full or absolute property. This absolute property of a nation, in what it has thus seized upon, is its right of territory. When I say that a nation's right of territory consists in the absolute ownership of the land where it has settled, I mean its right of territory as far as other nations, or the members of other nations, are affected by this right. For in respect of its own members, its right of territory consists, not in an absolute, but in a paramount property. Occupancy in the gross gave the nation from the first a right of absolute property in the land where it settled. But a subsequent distribution and assignment, or a subsequent occupancy in parcels, gives the several members of the nation, private property in their respective shares. This private property, which they acquire by the assignment of the public, or by their own particular occupancy with the leave of the public, though it implies a right to use what is thus acquired, and to dispose of it, is not strictly a right of full property or absolute ownership. It is property because it is an exclusive right, in respect to all other individuals, to use the land and to dispose of it. But it is not full or absolute property in the strictest sense, because the public has a right to limit, and direct the use and disposal in such manner as the common safety and welfare require. This right of the nation is a sort of property, it is an exclusive right in respect of all other persons whatsoever,² whether individual or collective, to direct the use, and the disposal, of the land, for the purposes of social union."³ As we before remarked, our own courts in using the term "right" of eminent domain, speak rather of its effects, than of the quality itself, yet where their attention has seemed to be directed to the latter, they have pronounced it in some cases, the highest and most exact idea of property,⁴ and *dominium*,

¹ 15 Vt. 751.² Wheat. Int. Law, 217.³ Ruthf. Inst. B. 2, ch. 9, § 6.⁴ Grot. B. 1, ch. 1, § 6. ³ Paige, 73; contra 1 Hill, R. P. 82.

from whence the phrase comes, bears in its legal sense property and not power.¹

From the fact that the right of eminent domain is one of the elements of government—an essential to its existence,² comes the force of the proposition, that it exists above and superior to all constitutions.³ It is one of the fundamental principles upon which governments find their foundations; without it, any system would be imperfect, and necessarily inoperative. The State could not subsist, or constantly administer the public affairs in the most advantageous manner, if it had not a power to dispose occasionally of all kinds of property subject to its authority;⁴ it is therefore said to be inherent in the sovereign: it attaches to his very existence; and when laws mention it, it is not so much in declaration of its principles, as in restraint of its possible abuses. Hence, will be seen the force of the assertion, that to part with it is to commit a species of national suicide.⁵ The question as to how far a people might divest themselves of this sovereign attribute could not arise in England, or at least has not as yet, so far as we know: and the reason why it can never arise in that country finds its solution in the form of government peculiar to those States, which have never enjoyed the benefits of a constitution such as our own. The King and Parliament of Great Britain are the supreme authority of the State,⁶ and as such would be *bound* by no transfer of this attribute of sovereignty, even assuming the State could subsist without it. We are safe then, we think, in asserting the impossibility of such a question ever coming before an English court.

In this country, however, the question has arisen, and been elaborately examined; and upon some subjects, after years of litigation, has been put at rest forever.⁷ But there is still a class of cases that remain to vex our halls of justice with their perplexing subtleties, and leave unsymmetrical the structure of American jurisprudence.⁸ It grew out of the peculiarity of our national institutions and form of government.

¹ 2 Pars. Con. 519.

³ 4 Pet. S. C. 548.

⁵ 6 Cranch, 143; Puff. B. 8, ch. 5, § 7.

⁷ 21 Vt. 594 &c.; 6 How. 529.

² 4 Pet. S. C. 561.

⁴ Vattel B. 1§ 244.

⁶ 4 Inst. 36; 1 Blac. Com. 91.

⁸ 2 Pars. Con. 523.

Upon the separation of the colonies from Great Britain, each one of them became a separate, independent sovereignty. For the purpose of successfully resisting the English government, a confederacy was formed; and upon the conclusion of the war, from a common sympathy and late experience of its mutual benefits, the confederacy, with a brief interval,¹ was more intimately connected and strengthened by the formation of the Constitution of the United States. By the provisions of this instrument, the people in their sovereign capacity entered into a solemn compact with each other,² to administer the functions of their government in a specified manner; and created the several departments of the government, constituting them their agents to accomplish its provisions. This constitution is the supreme law of the land, to which every other power is subordinate. It will thus be seen that a part of the sovereign powers of each State was conceded to the confederacy; and to the extent of the powers conceded, to that extent were these powers extinguished in each of the several States.³ A part of the constitution contains certain specific inhibitions or limitations on the power of the States, which the exigencies of the times, and policy of the government, demanded. Among these was the clause relative to contracts.

Owing to the rupture with the mother country, and the necessary consequences following thereon, great pecuniary embarrassment was experienced throughout the colonies, and in almost all of them, laws were passed relative to tender and extension of time; all of which seemed to increase rather than diminish the evil; it had proceeded to that extent, that, in the words of the *Federalist*—"The sober people of America had become weary of the fluctuating policy which had directed the public councils;"⁴ and in view of a prevention of it for the future, they deemed it expedient to insert the 10th section of the first article of the Constitution of the United States, which declares that "No State shall pass any law impairing the obligation of contracts."

Perhaps there is no clause of the constitution which has given

¹ 1 Story Com. Con. § 243-71. ² 1 Story Com. Con. § 310. ³ 7 Con. 247.

⁴ *Federalist*, No. 44; Story Const. § 1,368; Tuck. Blac. vol. 1, pt. 1, p. 312.

rise to more acute and vehement controversy than this; and the extent of whose prohibitory force has called forth more animated juridicial discussion, a very large share of which has involved the question—to a proper understanding of which we have deemed this cursory glance at the leading peculiarities of our government necessary—of how far a State, under the constitution, shall be held to have divested itself of the right of eminent domain. The discussion originated in that singular class of contracts termed franchises, which involve in their nature the evident liabilities of property to the public uses; together with the complicated question of the constitutional protection afforded to a contract.

There is perhaps no part of the law of eminent domain which has received so large a share of the consideration of the courts, or which has been more difficult to establish on unquestionable principles, than that part of it pertaining to incorporeal property. In our own country, it is believed that the exercise of this power was never, or at any rate rarely, questioned, until the opinion seems to have obtained that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being less.¹

While it has never been doubted that the ordinary species of property are subjected to this right, there seems to have been something in the peculiar nature of this, so abstracted from all other kinds upon which the law had heretofore operated, that for a long time it was doubted, and because of the very diverse views entertained by the courts, for a much longer time contended, there was an exemption in its favor from the otherwise universal burthen.

The controversy may be said to have originated in the celebrated Dartmouth College case;² in which it was decided that a charter granted to that institution by George III., was a contract within the meaning of the clause of the Constitution, that its terms were inviolable, and that the Legislature of New Hampshire could in no

¹ 6 How. 533.

² 3 Ohio, 583.

way annul that contract, or in any way impair its obligation.¹ This being a franchise, it was next claimed that as the grant of a franchise was a contract between the State and the grantee, it could not rightfully be taken away, diminished or impaired without his consent, even for public purposes. The question arose in New Hampshire. The facts of the case were, briefly, these: The Legislature of that State made a grant of the privilege of erecting a bridge within expressed exclusive limits, to the Piscataqua Bridge Company. At a subsequent period, they deemed the public convenience required a second bridge, and the New Hampshire Bridge Company was chartered with the privilege of erecting a bridge within the exclusive territory. The question was one of singular importance from the valuable interests it would affect, if decided either way. The courts had held that a franchise was a contract, and the constitution declared a contract should not be impaired. Was it true, then, that the State had never under this clause irrevocably parted with their right of eminent domain, and that property, created by this species of contract, should be privileged from the otherwise common charge? Mr. Justice Parker discussed this novel question in an opinion, the sound law of which is an exposition of the constitution the courts of the United States have repeatedly confirmed. He stated in most terse and logically conceived propositions, drawn from the decisions of the Supreme Court of the United States, that the grant under which the first bridge company received their charter, was undeniably a contract; and that that contract was inviolable within the constitution; but that it did not impair that contract to hold that the property acquired under it, may be taken for public use—that it was liable to be subjected to the public servitude and the public burthens.² This case was not carried to the Supreme Court of the United States.

The next case that occurred involving the question, was one which it would seem exhausted the learning of the ablest lawyers of the day; it is almost unnecessary to mention the name of the Charles River and Warren Bridge case.³ The legislature of Massachusetts extinguishing a ferry privilege over the Charles river, which had

¹ 4 Wheat., 518.

² 7 N. H., 68 & C. C.

³ 11 Peters S. C., 420.

previously belonged to Harvard College, granted to the Charles River Bridge Company, the privilege of erecting a bridge over the river where the ferry had been. No exclusive limits were expressed as in the New Hampshire case. The legislature afterwards incorporated the Warren Bridge Company, and authorized them to erect a bridge so near that of the Charles River Bridge Company, that it effectually destroyed their tolls. Upon suit, the Charles River Bridge Company claimed that their charter contained exclusive limits by implication, which entitled them to compensation, even if the State had the power to seize their franchise: but that the franchise itself was an implied engagement on the part of the legislature, not by a subsequent grant of any conflicting charter to interfere with the privilege conferred on them, and, as a contract, was protected by the constitution. The Supreme Judicial Court of the State was divided: two of the judges holding that the charter implied no exclusive limits; and, consequently, the legislature interfered with no rights or property belonging to the Charles River Bridge Company by the grant to the second company; while the other two members of the court held that there were necessarily implied exclusive limits, and also an engagement not to charter a second company which was protected by the constitutional clause.¹ On a judgment *pro forma* the case went to the United States Supreme Court, where *four* of the *seven* judges held that the charter, upon construction, contained no exclusive limits, and, consequently, the legislature might charter a second company without compensation. McLean, J. was of the opinion that the charter contained implied exclusive limits; but as the second grant operated to take away the property of the Charles River Bridge Company—"to operate," as he expressed it, "on the subject matter of the contract, and not on the contract itself," it did not impair the obligation of it, within the constitutional meaning; and if compensation had been provided, the grant would have been valid. Story and Thompson, JJ., held that the charter did, by implication, contain exclusive limits, which prohibited the legislature from making the second grant, unless compensation was provided for the injury done the

¹ 7 Pick., 344-8.

property vested by the first ; but they allowed that if compensation had been provided, the grant would have been valid.¹

The results of the very diverse views, particularly on the construction of the charter claiming privilege by implication, left the exact light in which the law viewed this kind of property, as affected by the constitution, a matter of grave doubt ; and some of the ablest constitutional lawyers of the day did not hesitate to declare their opinion that the decision of the court could not stand.²

The next case that involved the question of the State's paramount right, also occurred in Massachusetts. The legislature chartered the Boston Water Power Company with the privilege of constructing certain dams and basins for milling purposes. By a subsequent act, the legislature incorporated the Boston and Worcester Railroad Company, with authority to select the most eligible route between the two termini ; and, upon compensation to whomsoever should be injured by the construction of such road, to complete the same between the two cities. The Water Power Company claimed, that by the performance on their part, of the conditions of their charter, in the construction of works of great magnitude, expense, and public utility, they became entitled to the exclusive privilege of forever occupying the soil included within the limits of their two basins ; and that the railroad company had no right to construct their road across these basins, in any manner to the injury or impairment of their water power, or of the privilege or franchises held by them ; because the legislature could not constitutionally destroy, or essentially injure, by a subsequent grant, a franchise which it had previously created, and thus in effect vacate its own contract, and this whether there was provision for compensation or not. The court, in its decision, adhered to the admirable principle attributed to Lord Tenterden, of never laying down a larger proposition of law than the case in hand required.³ They held that the effect of the authority granted to the railroad company to lay their road over the basins, was to some extent to diminish their surface and reduce their value ; but it could in no proper legal sense be considered as annulling or destroying their franchise, for both could stand together—

¹ 11 Peters S. C., 420.

² Webster's Arg., 37 Law Tr.

³ 31 E. C. L., 96.

that the legislature had power, to a limited extent, to exercise the right of eminent domain over the lands of the Water Power Company, paying compensation; and as provision was made for it the act was valid. There was a *dictum* seeming to approve the law as held in New Hampshire, but the cases were dissimilar in their facts, and that case was not cited by the court.¹

The next case was again in New Hampshire, and again C. J. Parker decided that a franchise could pretend to no constitutional exemption on the ground of its similitude to a contract. A public road under a general highway act, providing compensation, was laid out over the road of a turnpike company. The charter of the company did not, as in the first case, contain any grant of exclusive limits. It was held, in conformity with the previously declared law of the State, that the highway act did not impair the obligation of a contract, in taking any property of the turnpike corporation for public use; because there was by the terms of the charter, no contract of that character expressed, and it was not to be implied.²

The question was next passed upon in the State of Vermont, and the court there considering the question as having of late been so fully discussed, both in the State and national tribunals, say that little more remained for their determination, unless they were prepared to disregard the aid and authority of the numerous decisions which so commended themselves to the learning of the profession, and the good sense of the public generally.³ But neither the good sense of the public, nor particularly the learning of the profession of that State, seemed ready to acknowledge the court's conclusions; and accordingly, a case was brought into the same court, under the same statute, so similar in its facts that the court considered the attempt to distinguish the two in principle, "altogether a failure."⁴ Upon judgment, as in the preceding case, it went on error to the U. S. Supreme Court.

It is to be observed that the question presented in this case involved no necessity of construction, as in that of the Charles River corporation. Here the charter by express provision, granted

¹ 23 Pick. 360.

² 11 N. H. 19.

³ 15 Vermont 745.

⁴ 16 Vt. 446.

to the West River Bridge Company the exclusive privilege of erecting and continuing a bridge over West river, and taking tolls for passing thereon. By the Act of 1839, "in relation to highways," it was declared that the Supreme Court, together with the county court, should have power to take any franchise of any corporation, upon compensation, when they deemed it necessary to the public convenience. The franchise of the West River Bridge Company was taken in conformity with the act, in the manner prescribed. The United States Supreme Court held that the charter of the West River Bridge Company formed a contract between that company and the State, which the latter could not impair; but that this did not exempt the charter from the universal right of eminent domain—that the Constitution of the United States could by no rational interpretation be brought to conflict with this attribute of the States—that the investment of property in the citizen by the government, when made for a pecuniary consideration, or founded on conditions of civil or political duty, is a contract with the State or the government acting as its agent, and the grantee; and both the parties are bound in good faith to fulfill it. But that into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself: they are superinduced by the pre-existing and higher authority of the law of nature, of nations, or of the community to which the parties belong: they are always presumed, and must be presumed to be known and recognized by all; are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount whenever a necessity for their exertion shall occur. Such a condition is the right of eminent domain. The right does not operate to impair the contract affected by it, but recognizes its obligation to the fullest extent, claiming only the fulfillment of an essential condition. Thus in claiming the resumption or qualification of the investiture, it insists merely on the true nature and character of the right invested.¹

¹ 6 How. 532.

We have thus in our journey down "the current of authorities," reached a point from which, whenever the courts touch upon the question, they consider it so well settled that franchises can claim no exemption from the right of eminent domain, that it would be idle to controvert it; indeed whenever the question has been latterly raised, it has been rather incidental than otherwise, and in every case to receive cumulative confirmation.¹

Another shape in which the question has been most perplexingly presented, is in the form of express or implied *stipulations* on the part of the State through the so-called authorized acts of their legislatures, *not to exert* their sovereign right of eminent domain. If the legislatures of the several States have the authority to make such stipulations, they are certainly under the clause of the constitution, protected from any action of those bodies which would impair their provisions. Our legislatures are our delegated agents, and possess the authority to represent the States in all contracts or engagements they may rightfully make: they are the direct visible representatives of the will of the people in every act they may legitimately perform.

The standard by which we must determine whether they have transcended the limits of that authority, is to be found in this question in the nature of the subject matter on which it is claimed they may act. But this we think will be best presented in as brief an examination of the cases as the nature of the subject will admit.

In some of the States, for purposes in the highest degree praiseworthy and commendable in themselves, it has been attempted as an encouragement to learning, religion, and sometimes questionable investments in point of profit, to relieve certain institutions or associations from liability to contribute in common with all other property, to the support of the commonwealth.

In the year 1758, the Legislature of the State of New Jersey passed an act to give effect to an agreement between the State and a remnant of the tribe of the Delaware Indians. This act, among other provisions, authorized the purchase of lands for the Indians,

¹ 21 Vermont, 590; 17 Con. 454; 8 N. H. 398; 9 Geo. 359-517; 13 How. 71; 2 Par. Con. 522.

and enacted that the land to be purchased for the Indians, aforesaid, shall not hereafter be subject to any tax, any law, usage or custom to the contrary thereof, in any wise notwithstanding. In virtue of this act, the agreement with the Indians was executed.

In October, 1804, the legislature passed an act repealing that section of the act of 1758, which exempted the lands therein mentioned from taxation. On a writ of error, the Supreme Court decided that the provision of the Constitution that no State shall pass any law impairing the obligation of contracts, which extended to contracts to which a State was a party, as well as to contracts between individuals, was violated by the act of 1804, as the privilege, though for the benefit of the Indians, was annexed by the terms which create it, to the land itself, and not to their persons.¹

In the case of the *Providence Bank vs. Billings*,² the Legislature of Rhode Island had granted a charter of incorporation to certain individuals, who had associated for the purpose of banking. They were incorporated with the ordinary powers of such associations. In 1822 the legislature passed an act imposing a tax on every bank in the State, except the Bank of the United States. The Providence Bank refused the payment of the tax, alleging that the act which imposed it, was repugnant to the Constitution of the United States, as impairing the obligation of the contract created by the charter granted to the bank. There was no *express* contract in the charter, exempting the bank from taxation; but it was claimed on behalf of the bank, that such contract must be implied, because the power to tax may be so wielded as to defeat the purpose for which the charter was granted.

The court say that the taxing power is of vital importance; that it is essential to the existence of government, are truths that it cannot be necessary to affirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. They will not say a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in sustaining it undiminished, that the community has a right to

¹ 7 Cranch, 164.

² 4 Peters S. C. 514.

insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does appear; and if the exemption is not found in the language of the instrument, it would be going very far to insert it by construction.

The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government as part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burthens, and that portion must be determined by the legislature. This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State governments. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally.

In *Osborne vs. Humphrey*,¹ a statute of the State of Connecticut, passed in 1702, provided that all such lands as formerly have been, or hereafter shall be given, either by the general assembly or any town, village, or particular person, for the maintenance of the gospel, or school of learning, or for the relief of the poor, or for any other public and charitable use, &c., shall be exempted out of the general list of estates, and free from the payment of taxes. The court held that this provision was repealed at the revision of the statutes in 1821; but relying on the decision in *New Jersey vs. Wilson*, they were of opinion that the repeal was inoperative as to the rights already acquired by virtue of the act, being repugnant to the Constitution of the United States, inasmuch as it impaired the obligation of a contract, and that the land continued to be exempt from taxation.

In the case of *Hardy vs. Inhabitants of Waltham*,² lands, tene-

¹ 7 Conn. 335.

² 7 Pick. 108.

ments, &c., which had been granted to Harvard College, under their original charter of 1650, in connection with other acts, were ordered to be from thenceforth and forever exempt from all civil rates, imposts and taxes. This grant of exemption was expressly confirmed by a clause of the State Constitution; consequently, the legislature could not impose a tax contrary to its provisions.¹

In the matter of *The Mayor, &c., of New York*,² it was claimed that an act declaring "that no real estate belonging to any church or place of public worship, shall be taxed by any law of the State," exempted the property specified from assessments for the benefit of the town, county, or State at large, but not from a special assessment for a benefit in which the property would directly participate. The question of legislative ability to release the subject from taxes, by a constitutionally supported contract, is not considered.

The next case arose in New Hampshire.³ The legislature of that State, in 1780, by an act or joint resolution, exempted the land appropriated to the use of Dartmouth College, from payment of taxes. In 1835, the proper authorities assessed taxes on a certain tract of land belonging to the college. The question of exemption was discussed by Parker, C. J., who said, "The power of taxation is essentially a power of sovereignty or eminent domain, and it may well deserve consideration whether this power is not inherent in the people, in a republican form of government, and so far inalienable that no legislature can make a contract by which it shall be surrendered, without express authority for that purpose in the constitution, or in some way directly from the people themselves." Referring to the case of *New Jersey vs. Wilson*,⁴ he said, "To that decision, based as it is upon a subject particularly within the cognizance and jurisdiction of the United States Supreme Court, we yield all deference, and should feel bound to follow it in a like case, could one come before us, until the tribunal which made the decision should overrule it. Perhaps it may well be supported on the ground that the act was in the nature of a treaty with the Indians, which the legislature of New Jersey might in 1758 well

¹ 10 N. H. 145.

² 2 John. 77.

³ 10 N. H. 138.

⁴ 7 Cranch, 164.

make with a body of them residing within the borders of the State, but constituting a separate and distinct people, governed by their own laws. The general rights of a legislature to surrender the power of taxing a portion of the property within the State, by a contract with some of its own citizens, in such a manner as to deprive a future legislature of the right to subject such property to its proportion of the public burthens, and this without an express grant of power in the constitution, does not appear to have been considered in that case. Let it be distinctly understood, that we do not intend to suggest a doubt of the right of the legislature in divers instances to make contracts which shall bind future legislatures, but to hold that the legislature cannot make a grant whereby property shall be exempted from public use; and to hold also, that they cannot contract to exonerate the property of the citizens from taxation, and thereby bind future legislatures, by no means indicates an opinion that the legislature have a right to rescind or abrogate grants of land and franchises or contracts lawfully entered into by a preceding legislature. But there is a material difference between the right of a legislature to grant lands or corporate powers or money, and a right to grant away the essential attributes of sovereignty or right of eminent domain. These do not seem to furnish the subject matter of a contract." But on the principle that the relinquishment of such a power is never to be assumed,¹ as there was no express grant of exemption, the court do not find it necessary to settle how far one legislature may bind another, in relation to the power of taxation.

The next case originated in Maryland.² The legislature of that State, in 1821, extended the charter of several banks to 1845, upon condition that they would construct a certain road and pay a school tax; and further provided, that upon any of the aforesaid banks complying with the terms and conditions of the act, the faith of the State was pledged not to impose any further tax or burthen upon them during the continuance of their charters, under that act. In 1841, an act was passed for the general valuation and assessment

¹ Ante, 655.

² 3 How. 133.

of property, under which taxes were laid upon the bank—the plaintiff in error in the case before the Supreme Court of the United States. The question raised by the agreed statement of facts was, “Did the act of Maryland of 1841, so far as it imposes a tax upon the shares of stock held by the stockholders in these banks claiming the benefit of the exemption, impair the obligation of a contract?” The court do not pass upon the above question, but say, “The question which this court is called upon to decide, and to which our decision will be confined is, Are the shareholders in the old and new banks liable to be taxed on their stocks, under the act of 1841? The argument for the State admitted the validity of the exemption, as to the franchise itself, but contended that the exemption did not extend to the shares of the stockholders. Upon construction of the act of exemption, the court find “that the clause in question was not meant as a pledge against further taxation upon the franchise alone, but that it was a pledge against *additional* taxation; and then proceeding to examine whether the exemption, by the terms of the charter, extended to the capital stock of the banks as an aggregate, and the stockholders from being taxed as persons on account of their stock, decide that it extends to both.” This being a case of construction, decides nothing towards the validity of a stipulation of this nature.

The question has been raised in Ohio, and in a late case the court, reiterating the law as previously declared, held with emphasis that the legislature could, under no combination of circumstances, relinquish the power of the State to tax its citizens for the support of the government.¹

We have now gone through the cases involving this question, and we see that the law is by no means certainly settled; but from the whole number of cases, we should say that it is our opinion, that when the question is by the Supreme Court of the United States disposed of, it will be against the view that a State by her legislature may part absolutely with her power of taxation.²

There is another class of cases analogous to those claiming

¹ 1 Ohio S. R. 578.

² 2 Par. Con. 525.

exemption from taxation, which, if anything, places the question in a stronger light.

It is where the State by express terms, in granting a particular property, stipulates not to exert her right of eminent domain, as to that property or the subject-matter of that grant. This question arose in Connecticut.¹ The legislature of that State, in 1798, chartered the Enfield Toll Bridge Company, with the privilege of erecting and maintaining a bridge over the Connecticut river, for the term of one hundred years. The charter further provided that no person should have liberty to erect another bridge between the north line of Enfield and the south line of Windsor. The company accepted the charter and constructed the bridge. Afterwards the Hartford and New Haven Railroad Company, under a charter granted to them to construct a road between the two cities of those names, built a bridge within the exclusive limits. The charter of the railroad company contained a clause that nothing therein contained should prejudice the rights of the Enfield Toll Bridge Company.

It was holden by the court, that it was the intention of those who framed the latter charter, that the rights of all should be secured and equally secured, which was in terms effected by the stipulation of exclusive limits; and to the argument that by thus seizing the franchise, the State was impairing the obligation of its own contract, the court replied: "This is to assume that there is no implied reservation in any contract with the State of the right of eminent domain."

A similar case occurred lately in Massachusetts.² The Boston and Lowell Railroad Company was incorporated in 1830, with the privilege of constructing a road between Boston and Lowell. The twelfth section of the act stipulated "that no other railroad shall, within thirty years, be authorized to be made from Boston to Cambridge, or Charlestown to Lowell, or to any place within five miles of the northern terminus of the Boston and Lowell road," with a reservation to the State of the privilege of purchasing the road upon

¹ 17 Conn. 61.

² 2 Gray's, (not yet published.)

payment of the whole cost of the road, with ten per cent. interest up to the time of purchase. Afterwards the Salem and Lowell, the Boston and Maine, and the Lowell and Lawrence Railroad Companies, were successively chartered, and by their junction and intersection there was a direct railroad route from Boston to Lowell. An injunction was prayed for to restrain them from so connecting.

Chief Justice Shaw, with the same caution which characterized him in the decision of an analogous case,¹ held that the State might well grant that such privilege should be exclusive, in consideration of the benefits conferred upon the public by the use of private capital and enterprise, reserving to itself the right to resume, in a specified manner, such franchise when the public necessities should demand it; and that a grant of this nature was not a surrender of the right of eminent domain, but that it still existed to be exercised in a particular way. Also, that the State had not, by the subsequent grant to the railroad companies, intended any injury to its previous grant to the first company; and that, as the connection of the roads did injury to the Boston and Lowell Railroad, they should be restrained from such connection. It will be perceived that the question, if at all, is only incidentally raised; it having been allowed that the State had not relinquished her right of eminent domain, but only prescribed the special mode in which it should be exerted.

And this concludes our observations on the right of eminent domain, as affected by the constitutional clause inhibiting the impairing or infringing of the obligation of contracts.

¹ Ante, p. 651.